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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91171281
Party	Plaintiff PomWonderful LLC
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Date	09/21/2012
Attachments	Motion Requesting Entry of Opposer's Prop. Protective Order Pt. 1.pdf (32 pages)(396168 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

POMWONDERFUL LLC	)	
	)	
Opposer,	)	Opposition No.: 91171281
	)	
v.	)	
	)	**OPPOSER'S MOTION REQUESTING**
JARROW FORMULAS, INC.,	)	**ENTRY OF OPPOSER'S *PROPOSED***
	)	**PROTECTIVE ORDER**
Applicant.	)	
	)	
	)	
	)	
	)	

I. Introduction

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, Rule 412 et seq. of the Trademark Rules of Practice, and the Board's order on August 29, 2012 ordering the parties to file a protective order in this case, Opposer POMWONDERFUL LLC ("POM") hereby files the following Motion requesting the Board's entry of POM's *Proposed* Protective Order.

II. STATEMENT OF ISSUE(S) IN DISPUTE

A. While Agreeing To The Necessity Of A Protective Order, The Parties Are Unable To Resolve Two Matters In An Order.

The parties have already agreed on the necessity of the Board's entry of a Protective Order ("Order") for the purposes of facilitating the anticipated exchange of confidential information during discovery. At this time, however, the parties disagree on two particular issues related to the Order. The particular issues involve whether: (1) certain counsel to a party may review documents; and (2) whether more sensitive documents should be labeled "highly confidential" or "trade secret/commercially sensitive".

POM advocates for (i) the inclusion of any counsel reviewing confidential information, subject to the execution of a separate declaration regarding such information, and (ii) defining more sensitive confidential information as "Highly Confidential" to prevent any confusion regarding who may review such information and to avoid the definition of "trade secret" and what qualifies as a "trade secret" being a contentious issue later in the proceeding.

On the other hand, Jarrow maintains that (a) the separate declaration is unnecessary and "in-house" counsel and "affiliated" parties should be excluded from the ability to review confidential information, and (b) more sensitive confidential information should be defined as "Trade Secret/Commercially Sensitive" consistent with the Board's standard protective order restricting information from "in-house counsel".

The issue framed by the parties' dispute is whether, in the context of this action, it is necessary and proper for the Order to provide the parties with a mechanism to limit "in-house counsel" access to certain confidential information.

B. POM's Version Of The Order Is Attached Hereto.

POM advocates for the inclusion of review by "in-house counsel", subject to execution by "in-house counsel" of a declaration attached to the Order, and requests that the Board execute the Order in the form and substance as evidenced in the attached **"Exhibit A."** Jarrow proposes that "in-house counsel" be defined broadly and the declaration be stricken. After meeting and conferring on the issue, counsel for POM and Jarrow were unable to reach a compromise. POM was advised by Jarrow's counsel that Jarrow will also be filing a motion requesting that the Board enter their version of a disputed protective order.

Based on the below statements, POM requests that the Board enter POM's *Proposed* Protective Order.

II. POM's Contentions And Points And Authorities With Respect To The Issue-At-Bar.

The parties agree on 99% of the terms of a Proposed Protective Order ("Order"). If Jarrow gets its way on the disputed 1% percent of the Order, the entire purpose of the Order will be compromised.

i. Background

At the start of this action, POM engaged the law firm of Loeb & Loeb as its counsel (Declaration of Danielle Criona ("Criona Decl.") at ¶2). In 2009, POM's then in-house counsel at Roll International took over representation of this case. (Criona Decl. at ¶3). However, on January 1, 2010, Roll Law Group, P.C. took over representation of POM. (Criona Decl. at ¶4). Roll Law Group P.C. is a law firm that, (i) is independently owned and managed from companies such as POM which are owned by Roll Global LLC, (ii) primarily services as clients, companies owned by Roll Global LLC, but also services other third party companies not owned by Roll Global LLC and individual clients, and (iii) is fully licensed by the California State Bar as a law firm. (Criona Decl. at ¶5).

An initial draft of the Order was circulated at the start of this action and the last circulated draft occurred in August 2009, drafted by Loeb & Loeb, prior to re-opening of the proceedings in August 2012. (Criona Decl. at ¶6). Since the proceedings have reopened, POM's counsel has tried to finalize the protective order in this case. It is important to note that counsel for Jarrow has been more than disinterested in timely resolving any disputes regarding the Order. (Criona Decl. at ¶7). Notably, POM's counsel has been forced to repeatedly request revisions or discussions of any outstanding matters and Jarrow's counsel has forced continued extensions of the issues, even forcing a further extension for the filing of the order (Criona Decl. at ¶8):

- On August 28, 2012, after the proceedings in this action resumed, POM circulated a revised version of the [*proposed*] protective order which the parties

agreed would be filed with the Board on September 17, 2012. (Criona Decl. at ¶9, Exhibit 1).

- On September 4, 2012, after counsel for Jarrow did not respond to POM's draft Order, counsel for POM emailed counsel for Jarrow and reminded them of the upcoming deadline to file the Order on September 17, 2012. (Criona Decl. at ¶10, Exhibit 2).
- On September 12, 2012, without having sent POM's counsel a revised draft or comments on POM's Proposed draft Order, counsel for Jarrow inquired with counsel for POM on whether Roll Law Group was "outside counsel". Counsel for POM immediately responded in detail that it was and added, "attorneys are always on their honor not to share highly confidential AEO information with their clients. Just because you are officially outside counsel to Jarrow, I have to trust that you will not share AEO information with Jarrow." (Criona Decl. at ¶11, Exhibit 3).
- On September 13, 2012, Jarrow's counsel again inquired into Roll Law Group's ownership structure and POM's counsel immediately responded to the inquiry that it was an independent law firm. (Criona Decl. at ¶12, Exhibit 4).
- On September 14, 2012, POM's counsel called Jarrow's counsel and again requested Jarrow's comments to POM's *Proposed* Order and Jarrow's counsel promised to provide it later that day. Jarrow's counsel did not deliver on its promise. (Criona Decl. at ¶13).
- On September 17, 2012 at 2pmPST, on the day that the Order was due to be filed with the Board, counsel for Jarrow called counsel for POM and verbally

described the changes it sought to the draft Order. Since the changes were substantial and sought to exclude POM's counsel from review of confidential information, the parties agreed to seek another extension to resolve the issues, but agreed that the parties would exchange drafts within twenty-four hours of receiving the other side's draft. (Criona Decl. at ¶14)

- On September 18, 2012 at 9amPST, POM's counsel received a draft Order from Jarrow's counsel and less than three hours later, POM's counsel included its requested changes along with a detailed explanation of the changes resolving the very issues that Jarrow protested against in the first draft. (Criona Decl. at ¶15, Exhibits 5 and 6).
- Jarrow's counsel did not revise the draft within twenty-four hours as promised and on September 20, 2012, POM's counsel emailed Jarrow's counsel requesting their revisions. (Crional Decl. at ¶16, Exhibit 7).
- In the afternoon of September 20, 2012, Jarrow's counsel called POM and did not articulate any new reasons for which it could not accept POM's revised changes other than to say it was "uncomfortable" and insisted on adopting only the language it suggested in its first draft. (Criona Decl. at ¶17).

ii. <u>"In-House Counsel"</u>

One of the terms of the POM's version of the *proposed* Order provides:

> "Disclosure may be made to counsel and employees of counsel for the Parties (including in-house counsel or other legal department employees of a Party), including law clerks, analysts, paralegals, secretaries, translators and clerical staff, who are assisting with the preparation and trial of the Action; so long as each such individual provides opposing counsel with a declaration under penalty

> of perjury in the form of **Exhibit A** attached hereto. Any such employee to whom counsel for the Parties makes a disclosure shall be provided with a copy of, and become subject to, the provisions of this Order requiring that the documents and information be held in confidence." (POM's *Proposed* Order ¶ 1(g)(i)).

POM's *Proposed* Order also requires that internal counsel reviewing the documents complete the short declaration, attached as Exhibit B to POM's *Proposed* Order. (POM's *Proposed* Order ¶ 1(g)(i) and Exhibit A thereto). Jarrow contends that these two provisions are not necessary and instead casts a broad definition over the term "in-house counsel", leaving Jarrow with every opportunity to refuse production of documents to counsel for POM, or to dispute the use of documents during the action by counsel for POM.

The proposed order by Jarrow casts a very broad net on the term "in-house counsel" to maintain their argument that Roll Law Group P.C. is "in-house counsel", even though in reality it isn't. POM fears that by Jarrow continuing to argue that Roll Law Group P.C. is "in-house counsel", it is paving the way for its future excuse for not providing documents in this case. POM believes this will only lend itself to a multitude of disputes throughout this action.

Jarrow's insistence on its definition of "in-house counsel" leads to a single, inescapable conclusion: that Jarrow intends to create discovery disputes as part of its gamesmanship in a calculated effort to thwart POM's efforts from obtaining much needed discovery in this case. Tellingly, Jarrow has already stalled on drafts of the Order, delaying much needed discovery that is due on October 23, 2012. (Criona Decl. at ¶18). POM fears that Jarrow's lackadaisical attitude regarding the protective order foreshadows imminent discovery disputes if their version of the Order is adopted. If counsel for POM is not allowed to review Jarrow's "highly confidential information", the "highly confidential information" will be rendered meaningless as POM will be unable to use it in its case in chief. Furthermore, POM added a safeguard provision to exclude any individual with ownership of POM from viewing highly confidential information. (POM's *Proposed* Order at ¶1(g)(ii)). POM's attorneys of record do not have

ownership interest in POM nor do they hold any employment or any other position with POM. (Criona Decl. at ¶19). Therefore, there is no reason for which Roll Law Group P.C. should not be permitted to review Jarrow's highly confidential information. A prohibition on the disclosure of information to Roll Law Group, whether or not Roll Law Group is "in-house counsel", would disrupt the effective conduct of this action.

During the parties meet and confer on September 17, 2012, counsel for Jarrow stated that it was only trying to prevent the disclosure of confidential information to counsel who would then use Jarrow's information for strategic business purposes. (Criona Decl. ¶14). In order to prevent the very issue that Jarrow's counsel raised, POM's counsel revised the Order to include a declaration that all counsel would execute, affirming that such counsel would not use the information for its client's strategic business purposes. Yet Jarrow continues to maintain that this is insufficient protection and that it is only "comfortable" with its version of the document. (Criona Decl. at ¶17).

Since Roll Law Group is an independent law firm, it is no more plausible that POM's counsel will use Jarrow's "highly confidential" proprietary information in an improper manner than it is that Jarrow's counsel would do the same. Therefore there is no loophole to allow POM to see, use or analyze Jarrow's highly confidential information, thereby undermining an essential purpose of the Order's Highly Confidential provision.

Ironically, during the meet and confer process POM's counsel learned that Jarrow's position is that because the Roll Law Group is located in the same building as its clients, it should be held to a strict standard governing confidentiality. (Criona Decl. at ¶14). Jarrow does not adequately explain why working in the same building requires imposition of additional confidentiality safeguards. Nonetheless, even if Roll Law Group's attorneys were in fact "in-house" lawyers, Jarrows's suggestion that they be precluded from reviewing attorney's eyes only material has been rejected by Courts. See e.g. 3M Company v. Reflexite Corp., 2003 WL 25867456 (D. Minn. 2003) (status as in-house counsel cannot alone create the probability of

serious risk to confidentiality and cannot therefore serve as the sole basis for denial of access citing U.S. Steel v. United States, 730 F.2d 1465, 1469 (Fed. Cir. 1984))

Moreover, Jarrows's *position actually supports* POM's position: if attorneys of Roll Law Group should be held to a higher confidentiality standard because they *are in the same building* as their client, it logically follows that when the attorney *is the client*, (rather than just working in their client's building) an even higher level of protection should apply. That is what paragraphs 1(g)(i) and (ii) of POM's *Proposed* Order will achieve.

First, Jarrow's argument that POM's attorneys, Roll Law Group, is "in-house counsel" and will have access to Jarrow's confidential information is a red herring. Roll Law Group is an independent law firm, not an owner of POM nor is POM an owner of it.

Second, POM has no intention of reviewing Jarrow's confidential information once its attorneys are given this information. POM *wants* to *include* language in the Order (paragraphs 1(g)(i) and (ii) of POM's *Proposed* Order) to apply to *all* counsel, not just counsel to POM, to prevent such a thing from happening.

Third, it is *Jarrow* who is infringing *POM's* trademarks, not the other way around. POM has no interest in, or use for, Jarrow's (apparently unsuccessful) confidential business information. The reverse is not true however. Jarrow's access to POM's confidential information, could substantially damage POM. If Jarrow was willing to intentionally copy POM's trademark, nothing will stop them from analyzing POM's confidential information and using such information for their own benefit.

iii. "Highly Confidential" Information

The second issue which is disputed by the parties is the definition of the term to protect information that is highly sensitive. POM contends that the proper definition is "Highly Confidential Information," and Jarrow contends that the term should be defined as "Trade Secret/ Commercially Sensitive".

The only reason for which Jarrow seeks to use the term "trade secrets/commercially sensitive" is once again to try to restrict documents from review by Roll Law Group as part of its gamesmanship regarding production of documents and the use of discovery materials by Roll Law Group in this case. In an effort to try to mimic the Board's standard protective order, Jarrow uses this term which specifically restricts the review of confidential information by any individual other than "outside counsel" and "independent experts". The clear motive here is that Jarrow is preparing to limit its production to Roll Law Group or prevent use of documents by Roll Law Group by arguing that Roll Law Group is not "outside counsel". The result of which is only to burden the Board with additional unnecessary motion practice because the parties will, no doubt, disagree as to what constitutes a trade secret or commercially sensitive information.

III. POM's Good Faith Effort to File a Joint Stipulation Instead of This Motion was Thwarted by Jarrow

In the morning of September 21, 2012, the date on which a protective order was due to be filed with the Board, when the parties still couldn't agree, POM's counsel suggested to Jarrow's counsel that the parties file a joint stipulation requesting the Board's intervention to select one of the competing versions of the Order. (Criona Decl. at ¶20). Jarrow's counsel agreed. (Criona Decl. at ¶20). POM's counsel spent more than five hours drafting its portion for the stipulation, and after finalizing its text for the motion, POM's counsel sent the text to Jarrow's counsel. (Criona Decl. at ¶21). Late in the afternoon on September 21, 2012, after reviewing POM's version of the joint motion, Jarrow's counsel called POM's counsel to inform POM's counsel that it refused to file a joint motion and would instead be filing a separate motion regarding the competing protective orders. (Criona Decl. at ¶22). POM's counsel relied on Jarrow's counsel's good faith representation when it forwarded POM's insertion for a joint motion, along with all of POM's points and authorities. (Criona Decl. at ¶23). Jarrow's counsel took advantage of this position and has now forced POM to submit a separate motion

with a result of needless motion practice which will burden the Board. This conduct only serves to foreshadow Jarrow's future conduct regarding discovery, especially as it relates to producing documents to be reviewed by Roll Law Group.

POM requests that the Board sign the version of POM's *Proposed* Protective Order, attached hereto as Exhibit A, which contains these reasonable prophylactic provisions to avoid unnecessary motion practice by both parties, which will in turn needlessly burden the Board.

Date: September 21, 2012

Respectfully Submitted,

POM WONDERFUL LLC

By: /s/ Danielle M. Criona /s/

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EXHIBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

POMWONDERFUL LLC Opposer, v. JARROW FORMULAS, INC. Applicant.	Consolidated Opposition No. 91171281 Marks: POMAMAZING (78/751,860) POMEGREAT (78/635,298) POMESYNERGY (78/727,050) POMGUARD (78/829,128) POMOPTIMIZER (78/829,152) POMEZOTIC (77/294,016)

STIPULATED PROTECTIVE ORDER REGARDING
CONFIDENTIALITY OF DISCOVERY MATERIAL

Whereas, the parties to the above-captioned action (the "Action"), POMWonderful LLC and Jarrow Formulas, Inc. (each, a "Party" and together, the "Parties"), have stipulated that the use and disclosure of certain materials and information exchanged by the Parties, or provided by or obtained from non-parties in this Action, be restricted pursuant to the following terms of this Protective Order (the "Order").

This Order does not affect the burden of proof that must be met by a Party seeking to protect such materials or information that is filed with the U.S. Patent and Trademark Office, Trademark Trial and Appeals Board (the "Board") in the records in this Action. A Party seeking to protect such materials and information to be filed in the public records must prove that the materials or information meets the standards set forth in relevant authority. In meeting that burden, a Party may not rely on its own designation of materials or information as "Confidential" or "Highly Confidential" under this Order.

Accordingly, it is this _____ day of _____, 2012, by the Board, ORDERED:

1) Designation of Discovery Materials as Confidential or Highly Confidential. All documents, depositions, pleadings, exhibits and all other material or information subject to discovery in this Action, including but not limited to materials or information produced in the course of discovery, all answers to interrogatories, all answers to requests for admission, all responses to requests for production of documents, all deposition testimony and deposition exhibits, and all expert testimony and reports, as well as testimony adduced in this Action, exhibits, matters in evidence and any other material or information used or disclosed related to this Action, hereafter furnished, directly or indirectly, by or on behalf of any Party, person or witness in connection with this Action, may be considered confidential, or highly confidential. A Party may seek to protect such materials and information by employing one of the following designations:

a) "Confidential Information": Information and materials shall be designated as confidential by placing or affixing the words "**CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER**" on the information or materials in a manner which will not interfere with their legibility.

b) "Highly Confidential Information": Information and materials shall be designated as highly confidential by placing or affixing the words "**HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY- SUBJECT TO PROTECTIVE ORDER**" on the information or materials in a manner which will not interfere with their legibility.

c) The designation of Confidential Information or Highly Confidential Information shall be made prior to, or contemporaneously with, the production or disclosure of such information or materials.

d) Portions of depositions of a Party's present and former officers, directors, employees, agents, experts, and representatives shall be deemed Confidential Information or Highly Confidential Information only if it is designated as such when the deposition is taken or within thirty (30) days after receipt of the final transcript by counsel for the deposed Party. Any testimony which describes material or information which has been designated as Confidential Information or Highly Confidential Information shall also be deemed to be designated as Confidential Information or Highly Confidential Information as the case may be. To ensure that the Parties have the full thirty (30) business days to make the appropriate designation, all deposition transcripts will be automatically treated as Highly Confidential Information for thirty (30) days after receipt of the final transcript by counsel for the deposed Party.

e) Where particular discovery material contains Confidential Information, Highly Confidential Information, and non-confidential information, only the Confidential Information and Highly Confidential Information are subject to the limitations on disclosure as set forth in this Order.

f) Information or documents designated as Confidential Information or Highly Confidential Information under this Order shall not be used or disclosed by the Parties or counsel for the Parties or any persons identified in subparagraph (e) below for any purposes whatsoever other than preparing for and conducting this Action (including appeals).

g) The Parties and counsel for the Parties shall not disclose or permit the disclosure of any materials or information designated as Confidential Information or Highly

Confidential Information under this Order to any other person or entity, except that disclosures of Confidential Information may be made only in the circumstances set forth in Paragraphs (i) through (viii) below and disclosures of Highly Confidential Information may be made only in the circumstances set forth in Paragraphs (i) and (iii) through (viii) below:

i) Disclosure may be made to counsel and employees of counsel for the Parties (including in-house counsel or other legal department employees of a Party), including law clerks, analysts, paralegals, secretaries, translators and clerical staff, who are assisting with the preparation and trial of the Action; so long as each such individual provides opposing counsel with a declaration under penalty of perjury in the form of **Exhibit A** attached hereto. Any such employee to whom counsel for the Parties makes a disclosure shall be provided with a copy of, and become subject to, the provisions of this Order requiring that the documents and information be held in confidence.

ii) Notwithstanding anything to the contrary in this Order, if counsel of record for any party to this Action has any ownership interest in any party to this Action, such counsel will not have access to or be allowed to review any material marked as "Highly Confidential";

iii) Disclosure may be made only to employees of a Party required in good faith to provide assistance in the conduct of the litigation in which the information was disclosed, and who execute the acknowledgement attached hereto at **Exhibit B** prior to receipt of any such material or information.

iv) Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents, and any interpreter, court or other shorthand reporter or typist translating, recording or transcribing testimony.

v) Disclosure may be made to non-party consultants, investigators, or experts (hereinafter referred to collectively as "experts") who are expressly retained by the Parties or counsel for the Parties to assist in the preparation and trial of the action, so long as any such expert is not a current or former employee of or consultant to either Party, or a current employee of or consultant to any of the disclosing Party's competitors, and with disclosure only to the extent reasonably deemed necessary within disclosing counsel's sole discretion for such expert to perform such work.

vi) Disclosure may be made to the Board, as well as personnel of the Board and all appropriate courts of appellate jurisdiction.

vii) Disclosures may be made to service contractors (such as document copy services), jury consultants and graphic artists by any attorney or individual described in sub-paragraph (i) or (ii) above, to assist in the preparation of this Action, with disclosure only to the extent reasonably deemed necessary within disclosing counsel's sole discretion to perform such work.

viii) Disclosures may be made to any person who authored and/or was an identified original recipient of the particular Confidential Information or Highly Confidential Information sought to be disclosed to that person, or any deponent

when the examining attorney has a good faith basis to believe the deponent is aware of the particular Confidential Information or Highly Confidential Information sought to be disclosed.

ix) Disclosures may be made to any other person agreed-to by the producing Party in writing.

h) Ten (10) days prior to the disclosure of any Confidential Information or Highly Confidential Information of the producing Party to persons described in paragraphs (iv) and (viii), above, the attorney for the receiving Party shall serve notice on the producing Party identifying the person(s) to receive such Confidential Information or Highly Confidential Information together with a fully executed copy of the acknowledgement attached hereto as **Exhibit C**, completed by such person. If the producing Party objects in writing to disclosure to such consultant, investigator, or expert within the ten (10) day period, no disclosure of material designated as Confidential Information or Highly Confidential Information may be made to the consultant, investigator, or expert. If the Parties cannot resolve the issue within five (5) days after such written objection is received by the non-objecting Party, the Party objecting to the proposed disclosure may thereupon seek, within ten (10) days of receipt of the written objection by the non-objecting Party, an appropriate order from the Board protecting against the proposed disclosure of Confidential Information or Highly Confidential Information to the consultant, investigator, or expert. Failure to seek an order from the Board within the time provided herein shall constitute a waiver of the objecting Party's objection. Until the Board rules on the matter, no disclosure of information or materials designated as

Confidential Information or Highly Confidential Information shall be made to the consultant, investigator, or expert. Nothing herein shall give any Party the right to depose or obtain any discovery from any expert disclosed herein unless such expert is disclosed pursuant to Fed. R. Civ. P. 25(a)(2).

Notwithstanding the above, no Party shall be required to serve such notice if disclosure would reveal the identity of an expert retained purely for consulting and non-testifying purposes and which would disclose the receiving Party's attorney work product, so long as any such expert is not (i) a current or former employee of or consultant to either Party, (ii) a current or former employee of or consultant to any of the disclosing Party's competitors, or (iii) a consultant to or employed in the field of dietary and nutritional supplements, and with disclosure only to the extent reasonably deemed necessary within disclosing counsel's sole discretion for such expert to perform such work. The Party who retained any such consulting and non-testifying expert that was not disclosed must provide a copy of the undertaking signed by such expert within thirty (30) days after settlement or conclusion of this proceeding, including all appeals.

i) Except as provided in subparagraph (e) above, counsel for the Parties shall keep all materials and information designated as Confidential Information and Highly Confidential Information which are received under this Order secure within their exclusive possession and shall exercise the same standard of due and proper care with respect to the storage, custody, use and/or dissemination of such information and materials as is exercised with respect to their own proprietary or highly sensitive information.

j) All copies, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as "copies") of Confidential Information or Highly Confidential Information under this Order or any portion thereof, shall be immediately affixed with the words "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER," or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY – SUBJECT TO PROTECTIVE ORDER," to be consistent with the original, if those words do not already appear.

2) None of the provisions of this Order shall apply to the following categories of materials and information, and any Party may seek to remove the restrictions set forth herein on the ground that Confidential Information or Highly Confidential Information has/had been:

a) available to the public at the time of its production hereunder;

b) available to the public after the time of its production through no act, or failure to act, on behalf of the receiving Party, its counsel, representatives or experts;

c) known to such receiving Party, or shown to have been independently developed by such receiving Party, prior to its production herein without use or benefit of the information;

d) obtained outside of this action by such receiving Party from the producing Party without having been designated as Confidential Information or Highly Confidential Information; provided, however, that this provision does not negate any pre-existing obligation of confidentiality;

e) obtained by such receiving Party after the time of disclosure hereunder from a third party having the right to disclose the same; or

f) previously produced, disclosed, and/or provided by the producing Party to the

receiving Party or any third party without an obligation of confidentiality.

3) Confidential or Highly Confidential Information Filed with the Board. To the extent that any materials or information subject to this Order (or any pleading, motion or memorandum referring to them) are proposed to be filed or are filed with the Board, those materials and information, or any portion thereof which discloses Confidential Information or Highly Confidential Information, shall be filed under seal (by the filing Party) with the Board either (a) as a "Confidential Filing" made electronically through the Board's Electronic System for Trademark Trials and Appeals (ESTTA); or (b) in an envelope marked "SEALED PURSUANT TO ORDER OF BOARD DATED _____", together with an appropriate interim sealing motion and a statement substantially in the following form:

> "This envelope, containing documents which are filed in this case by (name of party), is not to be opened or the contents thereof to be displayed or revealed except by Order of TTAB or consent of the parties to this action."

Even if the filing Party believes that the materials or information subject to this Order are not properly classified as Confidential Information or Highly Confidential Information, the filing Party shall file an appropriate interim sealing motion; provided, however, that the filing of the interim sealing motion shall be wholly without prejudice to the filing Party's rights under paragraph of this Order.

4) Party Seeking Greater Protection Must Obtain Further Order. No information or materials may be withheld from discovery on the ground that the material or information to be disclosed requires protection greater than that afforded by paragraph 1 of this Order unless the Party claiming a need for greater protection moves for an order providing such special protection pursuant to Fed. R. Civ. P. 26(c). This Order is without prejudice to the right of any Party to

seek further or additional protection of information for which the protection of this Order is not believed by such Party to be adequate. Nothing in this Order shall be deemed to bar or preclude any producing Party from seeking such additional protection, including, without limitation, an order that certain information may not be discovered at all.

5) Challenging Designation of Confidential Information or Highly Confidential Information. A designation of Confidential Information or Highly Confidential Information may be challenged upon motion. The burden of proving the proprietary of a designation under this Order remains with the designating Party. The process for making such an objection and for resolving the dispute shall be as follows:

a) The objecting Party shall notify the producing Party in writing as to its objection(s) to the designations. This notice shall include, at a minimum, a specific identification of the designated material objected to as well as the reason(s) for the objection.

b) The objecting Party shall thereafter have the burden of conferring with the producing Party claiming protection (as well as any other interested party) in a good faith effort to resolve the dispute.

c) Failing agreement, the objecting Party may bring a noticed motion to the Board for a ruling that the discovery material or information sought to be protected as Confidential Information or Highly Confidential Information is not entitled to such designation. The producing Party bears the burden to establish that such discovery material is Confidential Information or Highly Confidential Information and is entitled to such protection under this Order.

d) Notwithstanding any such challenge to Confidential Information or Highly Confidential Information, all such material and information so designated shall be treated as such and shall be subject to the provisions of this Order until one of the following occurs: (i) the Party that designated the Confidential Information or Highly Confidential Information withdraws such designation in writing; or (ii) the Board rules that the designation is not proper and that the designation be removed.

6) Errors in Designation. A producing Party that inadvertently fails to designate material or information pursuant to this Protective Order as Confidential Information or Highly Confidential Information at the time of the production shall make a correction promptly, but in no event more than fifteen (15) days, after first becoming aware of such error or as soon thereafter as is commercially reasonable. Such correction and notice thereof shall be made in writing accompanied by substitute copies of each item, appropriately designated. Those individuals who reviewed the material or information prior to notice of the failure to designate by the producing Party shall, to the extent reasonably feasible, return to the producing Party or ensure destruction of all copies of such undesignated materials or information and shall honor the provisions of this Order with respect to the use and disclosure of any Confidential Information or Highly Confidential Information contained in the undesignated material or information from and after the date of designation. The Party receiving the information or material that the producing Party inadvertently failed to designate as Confidential Information or Highly Confidential Information shall not be in breach of this Order for any use made of such material or information prior to receiving notice of the inadvertent failure to designate.

7) Improper Disclosure. If information or material designated pursuant to this Order

is disclosed to any person other than in the manner authorized by this Order, the Party responsible for this disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the designating Party or its counsel, without prejudice to other rights and remedies of the designating Party, and shall make every effort to prevent further improper disclosure and to ensure that no further or greater unauthorized disclosure and/or use thereof is made.

8) Inadvertent Production. Counsel shall make their best efforts to identify materials and information protected by the attorney-client privilege or the work product doctrine prior to the disclosure of any such materials or information. The inadvertent production of any material or information shall be without prejudice to any claim that such material is protected by the attorney-client privilege or protected from discovery as work product and no producing Party shall be held to have waived any rights thereunder by inadvertent production. If a producing Party discovers that materials or information protected by the attorney-client privilege or work product doctrine have been inadvertently produced, counsel for the producing Party shall promptly give written notice to counsel for the receiving Party. The receiving Party shall take prompt steps to ensure that all known copies of such material and information are returned to the producing Party within five (5) business days of such request or as soon thereafter as is reasonable. Any notes or summaries, other than those expressly permitted under this section, referring to or relating to any such inadvertently produced information subject to a claim of immunity or privilege shall be destroyed. The receiving Party may afterwards contest such claims of privilege or work product as if the materials had not been produced, but shall not assert that a waiver occurred as a result of the production.

9) Return of Confidential Material at Conclusion of Litigation. At the conclusion of the Action, all Confidential Information or Highly Confidential Information under this Order and not received in evidence, and all copies thereof, shall be returned to the originating Party within ninety (90) calendar days. If the Parties so stipulate, the materials may be destroyed and certified destroyed instead of being returned. Counsel for the parties may only retain one copy of pleadings filed for archival purposes, but may not otherwise keep any other Confidential Information or Highly Confidential Information. Each Party's obligation to destroy or return materials or information stored in electronic format shall be limited to electronic data that is reasonably accessible to the Party, and shall not extend to offsite backup or archival media. The Board may return to counsel for the Parties, or destroy, any sealed material at the end of the Action, including any appeals.

10) Miscellaneous Provisions.

a) The entry of this Order shall not be construed as a waiver of any right to object to the furnishing of information or material in response to discovery and, except as expressly provided, shall not relieve either Party of the obligation of producing information or material in the course of discovery.

b) If at any time Confidential Information or Highly Confidential Information is subpoenaed by any arbitral, administrative or legislative body, or the TTAB, the person to whom the subpoena or other request is directed shall immediately give written notice thereof to counsel of the Party that has produced such Confidential Information or Highly Confidential Information and shall provide the Party with an opportunity to object to the production of such Confidential Information or Highly Confidential Information. If the

producing Party does not move for a protective order within ten (10) calendar days of the date written notice is given, the Party to whom the referenced subpoena is directed may produce, on or after the date set for production in the subpoena but not prior to the end of the ten (10) calendar day notice period, such material in response thereto.

c) Counsel of either Party shall have the right to exclude from depositions, other than the deponent and the reporter, any person who is not authorized under this Order to receive Confidential Information or Highly Confidential Information. Such right of exclusion shall be applicable only during periods of examination or testimony directed to Confidential Information or Highly Confidential Information, as applicable.

d) All notices required by any paragraph of this Order may be made by facsimile and/or email to counsel representing the noticed Party, however, notice in those manners is not effective without evidence of receipt of the facsimile and/or email by the noticed Party's counsel. The date by which a Party receiving notice shall respond or otherwise take action shall be computed from the date of receipt of the notice. Any of the notice requirements herein may be waived in whole or in part, but only in a writing signed by counsel for the producing Party.

e) Nothing in this Order shall bar or otherwise restrict counsel from rendering advice to his or her client with respect to this Action and, in the course thereof, relying in a general way upon his or her examination of Highly Confidential Information produced or exchanged in this Action; provided, however, that in rendering such advice and in otherwise communicating with his or her client, counsel shall not disclose the contents of Highly Confidential Information produced by any non-party.

f) Execution of this Order shall not constitute a waiver of the right of either Party to claim in this Action or otherwise that any documents, communications, or any portion thereof, are privileged or otherwise non-discoverable, or are not admissible in evidence in this Action or any other proceeding.

g) All persons receiving Confidential Information or Highly Confidential Information are enjoined from producing them to any other persons, except in conformance with this Order. Each individual who receives Confidential Information or Highly Confidential Information agrees to subject himself/herself to the jurisdiction of this Board for the purpose of any proceedings relating to the performance under, compliance with or violation of this Order.

h) The Parties agree that the terms of this Order shall survive and remain in effect after the termination of this Action. The Board shall retain jurisdiction to hear disputes arising out of this Order.

i) A Party may move at any time to modify the terms of this Order. A Party seeking to modify this Order shall request only the minimum modification as is reasonably necessary to address the grounds upon which its motion to modify is based.

j) Any headings used in this Order are for reference purpose only and are not to be used to construe or limit the meaning of any provision.

k) This Order may be executed in any number of counterparts, all of which, upon completed execution thereof by the Parties, together shall be deemed to constitute one original.

SEEN AND AGREED:

Dated: August __, 2012

Danielle M. Criona
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(312) 364-3111 (fax)

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Dated: August __, 2012

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(860) 275-3397 (fax)

Attorneys for Jarrow Formulas, Inc.

SO ORDERED:

Judge

EXHIBIT A

DECLARATION OF _____

1. I serve as [counsel/ law clerks/ analyst/ paralegal / secretary/ translator/ clerical staff] for _____ ("Party"). My title is _____ and my employer is _____ ("Employer"). [I am a licensed attorney in the state(s) of _____. In my role as counsel, I have responsibility for directing, overseeing, or otherwise participating in the litigation of this matter.] I do not have any ownership interest in the entity that I represent.

2. By signing below, I agree that I will not use, convey or distribute any information learned as a result of the receipt or review of documents (or other information) pursuant to this Protective Order ("Order") for any purpose relating to Party's sales, marketing, pricing, product design, product research and development, competition, employment, or any other business decision, unless expressly authorized by this Protective Order or any other order by any court or administrative body (including but not limited to TTAB).

3. I agree to abide by the terms of the Order on _____, and I have informed management and other relevant Party employees of my duties under that Order.

NOW, THEREFORE, I I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct

Dated: _____

_____
Name:
Address:

EXHIBIT B

WHEREAS, I, _____, am an employee of _____ and may have cause to examine Confidential Information or Highly Confidential Information pursuant to the foregoing Order. I have read and understand the provisions of the foregoing Order.

NOW, THEREFORE, I hereby consent to be bound by the provisions of the Order and to abide by all its terms with respect to materials and information deemed confidential in this proceeding.

Dated: _____

_____
Name:
Address:

EXHIBIT C

[SEE NEXT PAGE]

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

POMWONDERFUL LLC Opposer, v. JARROW FORMULAS, INC. Applicant.	Consolidated Opposition No. 91171281 Marks: POMAMAZING (78/751,860) POMEGREAT (78/635,298) POMESYNERGY (78/727,050) POMGUARD (78/829,128) POMOPTIMIZER (78/829,152) POMEZOTIC (77/294,016)

ACKNOWLEDGEMENT

I, _____, declare as follows:

1. My present employer is _____.

2. My business address is _____.

3. My occupation is _____.

4. In the past 12 months, I have consulted and/or served as an expert for the following companies (attach additional sheets if necessary): _____.

5. I have reviewed a copy of the Order in this Action, and I understand and agree to be bound by its terms and provisions.

6. I will hold in confidence, will not disclose to anyone not qualified or cleared under the Protective Order, and will use only for approved purposes in this litigation, any Confidential Information or Highly Confidential Information, as such terms are defined in the Order.

7. I will return all Confidential Information or Highly Confidential Information that come into my possession, and all materials or information which I prepare relating thereto, to counsel for the Party by whom I am employed or retained.

8. I hereby submit myself to the jurisdiction of the United States Patent and Trademark Office, Trademark Trial and Appeal Board for the purposes of enforcement of the Order in this Action.

9. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: _____

_____
Name:
Address: